

³ *Order Dismissing Petition to Suspend Tariff*, 11 (April 14, 2003).

and that the tariff was not anticompetitive.⁴ Further, the majority determined that to the extent there are any other claims outstanding after the filing of BellSouth's February 21st tariff, the claims are without merit and should be dismissed.⁵ For the reasons stated herein, I respectfully dissent from the majority's decision.

The Uniform Administrative Procedures Act ("UAPA") provides certain rights and protections to parties engaged in a contested case. Section 4-5-304 prohibits ex parte communications while a contested case is proceeding.⁶ Pursuant to Section 4-5-314, any final order of the Authority "shall include conclusions of law, the policy reasons therefor, and findings of fact for all aspects of the order."⁷ Sections 4-5-316 permits a party to a contested case to file a petition for stay of a final order,⁸ and Section 4-5-317 permits a party to file a petition for reconsideration of a final order.⁹ Of particular importance is Section 4-5-322. This section allows a party to seek judicial review of a final order of the Authority by filing a petition for review with the Tennessee Court of Appeals.¹⁰

The Authority's own statutes offer additional rights and protections to parties in contested cases. Section 65-2-108 requires the Authority to provide all parties to a contested case an opportunity for hearing and reasonable notice of the time, place and issues for hearing.¹¹ Section

⁴ *Id.* It may be that the majority did not reach the merits of the anticompetitive claim, but instead simply relied on the Authority's past decisions. Unfortunately, the lack of explanatory language in the order coupled with the lack of citation to previous decisions makes it difficult to determine the exact basis for the majority's conclusion that the tariff is not anticompetitive. For the purposes of this dissent, I will assume the majority's decision was on the merits.

⁵ *Id.* at 11-12.

⁶ Tenn. Code Ann. § 4-5-304 (1998).

⁷ *Id.* § 4-5-314(c).

⁸ *Id.* § 4-5-316.

⁹ *Id.* § 4-5-317 (Supp. 2002).

¹⁰ *Id.* § 4-5-322 (1998 & Supp. 2002). There appears to be an error in the 2002 Supplement to Volume 2A of Tennessee Code Annotated. In the supplement, the fourth sentence of Tenn. Code Ann. § 4-5-322(b)(1) relating to appeals from the Authority is missing. In 2002, the General Assembly deleted the third sentence of (b)(1) and substituted a new third sentence. The General Assembly made no other alterations to this statute. 2002 Tenn. Pub. Acts 610. It seems that when the supplement was compiled both the third and fourth sentences were deleted and only the new third sentence was added.

¹¹ Tenn. Code Ann. § 65-2-108 (Supp 2002).

65-2-109 affords parties the right to cross-examine witnesses and the protection that the decisionmaker will rely only on the record when determining the case.¹² A protection similar to that found in Section 4-5-314 is stated in Section 65-2-112. This section demands that all orders in contested cases “contain a statement of the findings of fact and conclusions of law upon which the decision of the authority is based.”¹³ The ability to petition for rehearing is provided for in Section 65-2-114.¹⁴

All of these statutory provisions, as well as others not specifically listed here, apply only to contested case proceedings.¹⁵ There are no analogous statutes affording these same rights and protections to interested persons and entities during the time in which the Authority considers whether to convene a contested case.¹⁶ Thus, by denying the *Petition* and the *Complaint*, the majority inappropriately prohibited the rights and protections associated with contested cases from attaching. This alone, however, is not the point of my disagreement.¹⁷ Instead, it is the fact that the majority injudiciously prevented the attachment of these rights and protections while simultaneously deciding the merits of the petitioners’ claims that causes me to dissent.

¹² *Id.* § 65-2-109(2), (3).

¹³ *Id.* § 65-2-112.

¹⁴ *Id.* § 65-2-114.

¹⁵ The sections cited from the UAPA all fall under part three of the UAPA entitled “contested cases.” Other parts of the UAPA provide for general guidance and requirements for rulemakings, including procedures for declaratory actions. *See* Tenn. Code Ann. §§ 4-5-101 to -108, 4-5-201 to -227 (1998 & Supp. 2002). Moreover, Sections 4-5-304, 4-5-322, 65-2-108, 65-2-109, 65-2-112 and 65-2-114 specifically mention the application of the statutes to contested cases and do not reference any other type of proceeding.

¹⁶ This statement is made with the knowledge that show cause proceedings fall within the protection of the Authority’s contested case procedures and that, unless the Authority decides not to issue a declaratory order, declaratory actions are contested cases. *Id.* §§ 4-5-223, 65-2-106 (1998 & Supp. 2002).

¹⁷ I do not disagree that the rules cited in the majority’s opinion provide the Authority with discretion as to whether to convene a contested case. *See Order Dismissing Petition to Suspend*, 10 (Apr. 14, 2003) (citing Tenn. Comp. R. & Regs. 1220-1-2-.02(4), (5) (Mar. 2002), 1220-4-8-.09(2)(b) (Nov. 2001)). Nevertheless, these rules must be read in conjunction with Section 65-2-101, which provides that “the fixing of rates shall be deemed a contested case rather than a rule-making proceeding,” and Section 65-5-203, which provides that the Authority shall have the power upon the filing of a complaint regarding a rate change to hear and determine whether the change is just and reasonable. Tenn. Code Ann. §§ 65-2-101, 65-5-203(a) (Supp. 2002). Given the language of the statutes and rules, it follows that once the Authority decides to proceed by addressing the merits of a case involving the fixing of rates, as the majority did in this docket, that case is deemed a contested case.

The record here shows that as a result of the aggrieved entities in this docket expressing concerns that affected their interests, the majority ordered the Petitioner to make amendments to its original filing. The majority's very actions of ordering amendments consistent with the pleadings of the aggrieved entities rendered this proceeding a *de facto* contested case proceeding. Here, substance over form is crucial. Nevertheless, the majority disregarded the administrative consequences of its actions in favor of erecting a standard for the convening of a contested case that apparently requires an entity to prosecute its entire case on the front end in order to secure the judicial rights contemplated in Tennessee's Uniform Administrative Procedures Act.

As a result of the majority's actions, it is uncertain whether the aggrieved entities may avail themselves of Section 4-5-322 and appeal the decisions that there is no undue discrimination or anticompetitive effects and the decision to dismiss any other outstanding claims on the merits. I cannot agree that it is good policy or that the General Assembly intended¹⁸ for this agency to render decisions on the merits of contested issues raised in a petition without affording the parties on either side of the issues the rights and protections associated with contested cases, including the ability to petition for judicial review.¹⁹

In *Tennessee Consumer Advocate v. Tennessee Regulatory Authority*, the Tennessee Court of Appeals vacated an order of the Public Service Commission for violating the "basic principles of fairness."²⁰ In that case, the Authority considered a report of an expert and did not

¹⁸ During the oral deliberations, Director Tate stated:

I believe that this most current revised tariff is an improvement over the one that was originally submitted, and I certainly appreciate each of you-all -- all of the parties' participation through brief and comment, and, you know, just believe that this was a good way to go about it and this is the way that the legislature intended for us to act as a regulatory body.

Transcript of Proceedings, p. 95 (Mar. 3, 2003) (Authority Conference). Chairman Kyle agreed. *Id.* at 95.

¹⁹ However, the courts have recognized that the Authority may deny a contested case to a complainant when the pleading fails to meet the technical requirements of a complaint, the Authority has already decided the issues, and the complaint fails to state a claim upon which relief could be granted. See *Consumer Advocate Div. v. Greer*, 967 S.W.2d 759, 762-63 (Tenn. 1998); *Consumer Advocate Div. v. Tennessee Regulatory Auth.*, 2001 WL 575570, *6 (Tenn. Ct. App. 2001).

²⁰ *Tennessee Consumer Advocate v. Tennessee Regulatory Auth.*, 1997 WL 92079, *4 (Tenn. Ct. App. 1997).

permit the Consumer Advocate to cross-examine or otherwise impeach the expert. After citing various sections of the UAPA, the Court stated:

This Court concludes that the Commission committed a violation of basic principles of fairness in failing to afford the Consumer Advocate reasonable access to the materials to be considered and reasonable opportunity to cross-examine or otherwise impeach the origin of such materials.²¹

This is an important decision, despite the fact that it is unpublished. Moreover, it is a decision that should not have had to have been rendered. It goes without saying that this agency should comply with basic principles of fairness. It is my opinion that the fact that the majority decided that there was no unjust discrimination or anticompetitive effects and that any other outstanding claims should be dismissed on the merits without convening a contested case also violates the basic principles of fairness.

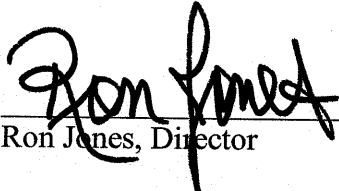
Parties have the ability after a contested case is convened to work together to simplify issues, reach settlements, and stipulate to facts.²² Moreover, there is nothing that requires that contested cases be lengthy. While contested cases often take longer than fifty-nine (59) days,²³ this is a result of the Authority's past efforts to ensure that all parties are given an opportunity to fully present their cases and that the decisionmakers have sufficient time to review the record and consult with advisory staff before reaching a decision. Given this, it is most likely true that had the directors voted to convene a contested case when this docket first came before us, it would have taken a bit longer, but at the end of the case the entities involved would have had the rights and protections afforded parties to contested cases, and, therefore, any aggrieved party clearly could have appealed the majority's decision.

For the reasons stated herein, I respectfully dissent from the majority's decision to deny the *Petition to Suspend Tariff and Open a Contested Case Proceeding* filed by the CLEC

²¹ *Id.*

²² Tenn. Code Ann. § 65-2-109 (Supp. 2002).

Coalition on January 22, 2003, dismiss the *Complaint and Petition to Intervene* filed by the Consumer Advocate on January 31, 2003, waive the thirty (30) day filing requirement in Authority Rule 1220-4-1-.04, and approve the tariff filed by BellSouth on February 21, 2003.



Ron Jones, Director

²³ BellSouth originally filed its tariff on January 3, 2003. Fifty-nine (59) days later on March 3, 2003, the majority issued its oral decision.